IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA
FAO(Ord.) Nos.160 and 161 of 2007.
Date of decision: 04.12.2007.

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1. **FAO(Ord.) No.160 of 2007.**

Col.Rattan Lal Sharma ….**Appellant.**
Versus
Jagdish Chand and Others ….**Respondents**

2. **FAO(Ord.) No.161 of 2007.**

Col.(Retd.) R.L. Sharma ….**Appellant**
Versus
Sanjay Kumar & Others. ….**Respondents.**

Coram

The Hon'ble Mr.Justice Dev Darshan Sud,J.

Whether approved for reporting ?[1]

FAO(Ord) No.160 of 2007.

For the Appellant: **Mr.Vikas Bhardwaj, Advocate.**

For Respondent 1: **Mr.Bhupender Gupta, Senior Advocate with Mr.Neeraj Gupta, Advocate.**

FAO No.161 of 2007.

For the Appellant: **Mr.Vikas Bhardwaj, Advocate.**

For Respondents 1 to 3: **Mr.Bhuvnesh Sharma, Advocate.**

For Respondents 4 & 5: **Mr.Bhupender Gupta, Senior Advocate with Mr.Neeraj Gupta, Advocate.**

Dev Darshan Sud,J.

Both these appeals are being disposed of by a common judgment as they arise out of the same order passed in appeal.

Two appeals were instituted in the Court of the learned Additional District Judge, Fast Track Court, Kangra at Dharamshala against the judgment and

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgement***?

decree, dated 23.3.2003 passed by the learned Senior Sub Judge, Kangra at Dharamshala decreeing the suit of the plaintiff-appellant for possession of half share by way of partition of the suit land etc. By the same judgment, the suit instituted by the respondent was also dismissed.

The learned trial Court, decreed the suit of the petitioner-plaintiff holding:-

> *"In view of findings and observations given under issues No.1 to 18, 18-A and 18-B, as discussed above, the suit of plaintiff succeeds and the same is decreed in favour of plaintiff and against the defendants as under:-*
> *`A' Preliminary decree for possession of ½ share by way of partition, situated on the western side of land comprising Khata No.32, Khatauni No.69, Khasra Nos.838, 839, 840, 841, 842 and 843, as entered in jamabandi for the year 1992-93, situated in Mohal Ram Nagar, Mauza Mant, Tehsil Dharamshala, District Kangra, H.P., alongwith vacant possession of cattle shed situated in Khasra No.841 and shop (two in number) situated in Khasra No.839 as shown in Aks Shajra and site plan, as per registered will Ex.PW4/A;*
> *`B' For vacant possession of cattle shed situated in Khasra No.841 aznd for recovery of arrears of compensation of Rs.10,800/- on account of use and occupation charges for the period from*

November 5, 1994 to November 5, 1997 at the rate of Rs.300/- per month;

(ii) For the recovery of arrears of mesne profits to the extent of Rs.6,000/- at the rateof Rs.2,000/- per year for the period from November 5, 1994 to November 5, 1997 on account of growing grass and vegetables etc. on the western side of ½ share of the suit land;

`C' For the recovery of Rs.10,800/- against the defendants No.1 to 3 on account of arrears of rent at the rate of Rs.300/- per month of the shop in question situated on the land bearing Khasra No.839 for the period from November 5, 1994 to November 5, 1997;
`D' For mandatory injunction against the defendants No.3 and 6 whereby the defendant No.6 is directed to pay rent of shop to the plaintiff in future.

However, the counter claim of defendant No.3 fails and as such the same is dismissed. In view of the relationship of the parties, they are left to bear their own costs. Decree sheet be drawn accordingly and the file after completion consigned to record room."

Two appeals were preferred against this order, one by the plaintiff claiming the entire relief as prayed for in the plaint and second by the

defendant against the rejection of their counter claim. The learned appellate Court, remanded the case for decision afresh after granting an opportunity to the parties for leading evidence on the additional issue framed by it which was:

> ***"1-A. Whether the defendants No.4 and 5 were bonafide purchasers and the land was purchased by them for valid consideration and they were put into possession, as alleged, if so, its effect? OPD-4&5.***

I have heard learned counsel for the parties and have gone through the record of the case.

The learned appellate Court was in clear error in setting aside the judgment of the learned trial Court and remanding the case for fresh trial. Issue No.3 framed in the suit was:

> ***"3. Whether sale deeds dated 28.1.1997 qua the suit land and mutation Nos.219 and 220 attested on the basis of sale deeds in favour of defendants No.4 and 5 are illegal, null and void, as alleged ? OPP"***

This clearly covered the controversy which was the basic defence of the respondents-defendants before the learned trial Court. Merely because, according to the appellate Court the question as to whether the transaction was bonafide or not was not answered,

although the entire evidence on the record was considered, it did not vest jurisdiction in the appellate court to have set aside the decree and remanded the matter for retrial afresh.

The parameters for the exercise of jurisdiction under Order 41 Rules 23, 23A, 24 and 25 of the Code of Civil Procedure are statutorily defined and there is ample case law showing as to under what circumstances a remand is to be ordered. It should not be done as a matter of course or because the appellate Court will have to undertake an exercise of scrutinizing the evidence on the record which is otherwise sufficient to raise controversy before the appellate Court. The appellate Court should also be mindful of the facts that so far as the framing of issue is concerned, in case, not an issue is claimed in trial, surely the party raising an objection that such issue was not framed, have to explain as to why such an objection was not taken before the trial Court under Order 14. These observations are not meant to preclude the jurisdiction of the appellate Court for exercise of jurisdiction for remand of the matter.

The Hon'ble Supreme Court has time and again emphasized that remand should be in the nature of an exception and not as a Rule. In ***Ashwinkumar K.Patel vs. Upendra J.Patel and Others,(1999)3 SCC 161,*** the Court held:

> *"8. In our view, the High Court should not ordinarily remand a case under Order 41 Rule 23 CPC to the lower court merely because it considered that the reasoning of the lower court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High court, it should have itself decided the appeal one way or the other. It could have considered the various aspects of the case mentioned in the order of the trial court and considered whether the order of the trial court ought to be confirmed or reversed or modified. It could have easily considered the documents and affidavits and decided about the prima facie case on the material available. … … … … … … …"*

To the similar effect is judgment of the Hon'ble Supreme Court in ***Patel Sureshbhai Jashbhai vs. Patel Satabhai Mathurbhai, (1983) 3 SCC 294.*** The Court should be mindful of the fact that remand does cause delay. ***See: Bechan Pandey and Others vs. Dulhin Janki Devi and Others, (1976)2 SCC 286, K.Krishana Reddy and Others vs. Special Deputy Collector, Land Acquisition Unit II, LMD Karimnagar, Andhra Pradesh, (1988)4 SCC 163.***

The learned District Judge has misdirected himself both on the questions of fact(s) and law. A

perusal of the judgment of the trial Court clearly shows that the fact as to whether sale deeds which were the foundation of the defence of the respondents, were considered by that Court. In the circumstances, the remand by setting aside the entire decree was unwarranted. In the facts and circumstances of the case, both these appeals are allowed. The judgment and decree of the learned Additional District Judge, Fast Track Court is quashed and set aside. A direction is issued in the following terms:-

(a) The appeals shall remain pending on the record of the appellate Court. The records of the case will be sent to the trial Court for the limited purpose as indicated hereinafter.

(b) That the learned trial Court will give a finding on issue No.3 as to whether the sales transaction which are alleged to be bonafide by the defendants, require the protection of the law or not.

(c) For this purpose, parties will not be allowed to lead any fresh evidence as the discussion on the point by the learned trial Court clearly shows that adequate opportunity had been given to the parties on this point when issue No.3 was being determined.

The parties are directed to appear before the learned Additional District Judge, Fast Track

Court, Kangra at Dharamshala on ***28.12.2007***. He will send the record to the learned trial Court and call for a finding on issue as framed by him. The appeal shall remain on the record of the learned appellate Court.

The learned trial Court will determine the issue within one month from the date on which it receives the record. The learned appellate Court will thereafter hear and decide the appeal within a period of three months. There shall be no order as to costs.

All the miscellaneous applications are disposed of. The interim orders shall stand vacated.

December 4, 2007 **(Dev Darshan Sud)**
(aks) **Judge.**